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July 27, 2006

FILED ELECTRONICALLY AND BY FIRST-CLASS MAIL SERVICE
The Honorable Charles L.A. Terreni
Executive Director
South Carolina Public Service Commission
Post Office Drawer 11649
Columbia, South Carolina 29211

RE: Joint Petition for Arbitration of NewSouth Communications, Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius [Affiliates] of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended
Docket No. 2005-57-C, Our File No. 803-10208

Dear Mr. Terreni:

Enclosed is the original and one copy of the Proposed **Order Ruling on Arbitration** for filing on behalf of the Joint Petitioners in the above-referenced docket. By copy of this letter, I am serving all parties of record in this proceeding and enclose my certificate of service to that effect.

Please acknowledge your receipt of this document by file-stamping the copy of this letter enclosed, and returning it in the enclosed envelope.

If you have any questions or need additional information, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,

John J. Pringle, Jr.

JJP/cr
cc:
all parties of record
Enclosures
THIS DOCUMENT IS AN EXACT DUPLICATE OF THE E-FILED COPY SUBMITTED TO THE COMMISSION IN ACCORDANCE WITH ITS ELECTRONIC FILING INSTRUCTIONS.

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2005-57-C – ORDER NO. 2006- -C

In the Matter of Joint Petition for Arbitration of NewSouth Communications, Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius [Affiliates] of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended	)	ORDER RULING ON ARBITRATION

PROCEDURAL BACKGROUND

This matter comes before the Public Service Commission of South Carolina ("Commission") on the Joint Petition for Arbitration ("Petition") filed by NewSouth Communications Corp. ("NewSouth"); NuVox Communications, Inc. ("NuVox");[1] KMC Telecom V, Inc. ("KMC V") and KMC Telecom III LLC ("KMC III") (collectively, "KMC")[2]; and Xspedius Communications, LLC on behalf of its operating subsidiaries Xspedius Management Co. Switched Services, LLC ("Xspedius Switched"), Xspedius Management Co. of Charleston, LLC ("Xspedius Charleston"), Xspedius Management Co. of Columbia, LLC ("Xspedius Columbia"), Xspedius Management Co. of Greenville, LLC ("Xspedius Greenville"), and Xspedius Management Co. of Spartanburg, LLC ("Xspedius Spartanburg")

[1] Pursuant to a corporate acquisition and merger of which the South Carolina Public Service Commission was notified on Mar. 8, 2004 and Sept. 23, 2004, respectively, NewSouth and NuVox are now the same company operating under the name NuVox. For ease of reference and to avoid confusion, NewSouth and NuVox will hereinafter be referred to as "NuVox/NewSouth".

(collectively "Xspedius") (together, the "Joint Petitioners[3]" or "CLECs")seeking resolution of certain issues arising between the Joint Petitioners and BellSouth Telecommunications, Inc. ("BellSouth") (together with the Joint Petitioners, the "Parties) in the negotiation of an interconnection agreement.

The Commission issued an Order Establishing Arbitration Plan and Schedule, Order No. 2005-217, on May 11, 2005. On May 19, 2005, the parties filed a Motion to Amend Arbitration Plan and Procedural Schedule, requesting certain changes in the pre- and post-hearing procedures. Joseph Melchers, Esquire, appointed by the Commission to serve as a Hearing Officer[4] in this matter, issued a Hearing Officer Directive on May 31, 2005 modifying the arbitration plan and procedural schedule for this Docket. In that hearing directive, the Hearing Officer modified the date for Commission resolution of unresolved issues in this Docket. Subsequently, the parties made various requests to the Commission to further modify the date for Commission resolution of unresolved issues, and the Commission has so modified the date for resolution.

Several hearings in this Arbitration took place, beginning on June 1, 2005, with the Honorable Randy Mitchell, Chairman, presiding. The Joint Petitioners were represented by John J. Pringle, Jr., John Heitmann, and Garrett R. Hargrave. The Joint Petitioners presented the Direct and Rebuttal Testimony of Hamilton E. Russell, Jerry Willis and James Falvey. Subsequently, at another hearing held in this Docket that took place on June 13, 2006, the

[3] On May 27, 2005, the KMC entities served notice of their withdrawal of participation in the Arbitration. As such, the Joint Petitioners no longer include the KMC entities.

[4] On June 29, 2005, Order Granting Substitution of Hearing Officer, Order No. 2005-352, was issued and Charles L.A. Terreni was appointed as substitute hearing officer in the docket.

prefiled rebuttal testimony and hearing testimony of Mr. Russell was adopted *in toto* by Susan Berlin, Vice President and Senior Regulatory Counsel for NuVox.

BellSouth was represented by Patrick W. Turner, James Meza, III, and Robert A. Culpepper. BellSouth presented the Direct and Rebuttal Testimony of P.L. (Scot) Ferguson, Eric Fogle, and Kathy R. Blake.

In addition to the prefiled testimony and the transcript of the hearing that took place on June 1, 2005, the Commission has permitted BellSouth and the Joint Petitioners (per a Joint Motion submitted to the Commission on May 26, 2004) each to supplement the record in this case by submitting the complete record, including hearing transcripts, from the corresponding arbitration case in one other state in the BellSouth region. Joint Petitioners chose the record from the Georgia arbitration, and BellSouth selected the record from the Florida arbitration. In addition, the parties submitted the written discovery and depositions from the North Carolina proceeding into the record, as well as each party's responses to the discovery served by the Staff of the Florida Public Service Commission. As such, the Commission has included and considered these additional records and documents as part of the record evidence in this case.

The Office of Regulatory Staff ("ORS") was represented by Florence P. Belser, Benjamin Mustian, and Wendy B. Cartledge. ORS did not present any witnesses.

At a hearing held on June 13, 2006, Susan Berlin, Vice President and Senior Regulatory Counsel for NuVox, adopted the pre-filed written Rebuttal Testimony and live June 1, 2005 hearing testimony of Joint Petitioner/NuVox witness Hamilton ("Bo") Russell.

LEGAL STANDARDS AND PROCESSES FOR ARBITRATION

After a telecommunications carrier has made a request for interconnection with another telecommunications carrier, and negotiations have continued for a specified period, the Act allows either party to petition a state commission for arbitration of unresolved issues. 47 U.S.C. § 252(b)(1). The petition must identify the issues resulting from the negotiations that are resolved, as well as those that are unresolved, and must include all relevant documentation, including the position of each of the parties with respect to the unresolved issues. 47 U.S.C. § 252(b)(2)(A). A non-petitioning party to a negotiation under this section may respond to the other party's petition and may provide such additional information as it wishes within twenty-five (25) days after the state commission receives the petition. 47 U.S.C. § 252(b)(3). The Act limits a state commission's consideration of any petition (and any response thereto) to the unresolved issues set forth in the petition and the response. 47 U.S.C. § 252(b)(4).

Through the arbitration process, the Commission must now resolve the remaining disputed issues in a manner that ensures the requirements of Sections 251 and 252 of the Act are met. Once the Commission provides guidance on the unresolved issues, the parties will incorporate those resolutions into a final agreement that will then be submitted to the Commission for its final approval. 47 U.S.C. § 252(e).

The purpose of this arbitration proceeding is the resolution by the Commission of the remaining disputed issues set forth in the Petition and Response. 47 U.S.C. § 252(b)(4)(c). Under the Act, the Commission shall ensure that its arbitration decision meets the requirements of Section 251 and any valid Federal Communications Commission ("FCC") regulations pursuant to Section 252; and shall provide a schedule for implementation of the terms and conditions by the parties to the Agreement. 47 U.S.C. § 252(c).

DISCUSSION OF ISSUES

In this section, we will address and resolve the open issues that have not been settled by negotiation and, therefore, must be resolved by the Commission pursuant to Section 252(b)(4) of the Act. The issues which the Commission must resolve are set forth in this section, along with a discussion of each issue that sets forth the Commission's findings and conclusions.

ITEM NO. 4, ISSUE NO. G-4: *What should be the limitation on each Party's liability in circumstances other than gross negligence or willful misconduct?* [GT&C § 10.4.1]

JOINT PETITIONERS' POSITION: Liability for negligence should be limited to an amount equal to 7.5% of the aggregate fees, charges or other amounts billed for any and all services provided or to be provided pursuant to the Agreement as of the day the claim arose.

BELLSOUTH'S POSITION: The industry standard limitation of liability should apply, which limits the liability of the provisioning party to a credit for the actual cost of the services or functions not performed or improperly performed.

DISCUSSION

Hamilton ("Bo") Russell and Susan Berlin (NuVox)[5] and James Falvey (Xspedius) testified to this issue for Joint Petitioners;[6] Kathy Blake testified to this issue for BellSouth.

Relief for Harm Caused by Negligence Is Appropriate

In most contracts, parties generally are provided some measure of relief from harm caused by the service provider. Rest. II Remedies § 373 ("the injured party is entitled to

[5] Mr. Russell's written Rebuttal Testimony and Hearing Testimony for this issue have been adopted by Susan Berlin.

[6] Petitioners selected one main witness to testify at the hearing to each item on behalf of both Petitioners, as they have a joint petition on all items. Each witness's hearing testimony was provided on behalf of both Petitioners.

restitution for any benefit that he has conferred"). Xspedius's template contract, for example, provides a limitation of liability for "mistakes, omissions, interruptions, delays, errors or defects in the service" that is capped at "$100,000 or five (5) months' worth of paid monthly recurring charges." JP Brief (July 27, 2006) ("JP Brief"), Attachment 1 (XSP00004-5) ("Attachment"). Or, as indicated by NuVox end user contracts, it is common for telecommunications carriers to offer service level guarantees, whereby end users are granted credits, calculated according to the duration of the harm, for all outages, regardless of their cause. JP Direct Test. at 23-24. Based on this evidence, BellSouth's proposed language, which provides no relief for harm caused by negligence, is not an "industry standard," but rather is more onerous than what Joint Petitioners themselves subject to in other contracts. *See* Kathy Blake Direct Testimony at 12:4 (May 11, 2005). The agreement between AllTel and NewSouth (predecessor to NuVox), for example, provides NuVox relief up to $250,000, or the aggregate amount of invoices in the relevant calendar year, for damages caused by AllTel's negligence. Tr. at 391:25 – 392:4; Direct Testimony of Joint Petitioners, Exhibit B (May 11, 2005).

BellSouth argues that subjecting it to any liability for harm caused by negligence is inappropriate due to the fact that the prices to be paid by Joint Petitioners are at TELRIC. Blake Direct Test. at 16:9-11. Yet BellSouth's witness Kathy Blake has conceded that TELRIC rates include the cost of BellSouth's business insurance as a joint and common cost. Transcript of Hearing, Georgia Public Service Commission, Case 18409-U, at 1002:1-10 ("GA Tr."). Having paid TELRIC rates for unbundled network elements, Petitioners have therefore contributed to BellSouth's insurance costs and thus should be entitled to the benefits of that insurance when they are injured through BellSouth's negligence.

Imposing some reasonable degree of liability for negligence on BellSouth, despite the fact that its rates are regulated to a certain extent, is thus a fair apportioning of risk, even in the interconnection environment. Service providers in the telecommunications market should be required to bear a level of risk that is in keeping with the revenue return that they can expect within the prevailing regulatory environment. *See* Rendi L. Menn-Stadt, *Limitation of Liability for Interruption of Service for Regulated Telephone Companies: An Outmoded Protection?*, 1993 U. Ill. L. Rev. 629, 640-41 (1993) (JP Brief, Attachment 2). BellSouth, having been provided rate relief for certain services, should not be held completely exempt from the harm its own negligence causes, and nor should Joint Petitioners. The Joint Petitioners' proposed cap of 7.5% provides a reasonable and proper balance between an injured party's right to relief and the ability of a party to pay out such relief, in this context.

Parties Can Calculate Damages Based on Amounts Billed as of the Day the Claim Arose

Joint Petitioners' proposed language states that damages caused by negligence shall be calculated as no more than 7.5% of the amounts billed up to and including "the day the claim arose." JP Direct Test. At 22. The 'day the claim arose' can be determined as a date certain, as BellSouth witness Blake acknowledges. GA Tr. at 1008:5-23 (Blake); Transcript of Deposition of Kathy Blake at 247:18-25 (Dec. 8, 2004) ("it could be proven that we failed in this period of time"). Network failures are events that can be tracked and identified through typical network diagnostics, and BellSouth is required by federal and state regulation to do so. 47 C.F.R. § 63.100; SC Code of Regulations 103-653. Joint Petitioners' language therefore does not permit or encourage parties to "game" the system (*see* Blake Direct Test. at 13:5) by claiming greater damages than they would be due.

Providing the parties some measure of relief for harm caused by negligence is appropriate in the context of Section 251/252 interconnection. Joint Petitioners proposed 7.5% cap on amounts billed as of the date of the harm imposes a proper and reasonable amount of risk in this context. Moreover, Joint Petitioners' proposed method of calculating damages, which is based on the date that the harm was caused, provides a fair and certain way of apportioning risk. Accordingly, we agree with the Joint Petitioners' position on this issue and adopt the Joint Petitioners' proposed language for General Terms and Conditions Section 10.4.1:

> With respect to any claim or suit, whether based in contract, tort or any other theory of legal liability, by either Party, any End User of either Party, or by any other person or entity, for damages associated with any of the services provided pursuant to or in connection with this Agreement, including but not limited to the installation, provision, preemption, termination, maintenance, repair or restoration of service, and, in any event, subject to the provisions of the remainder of this Section, each Party's liability shall be limited to and shall not exceed in aggregate amount over the entire term hereof an amount equal to seven-and-one half percent (7.5%) of the aggregate fees, charges or other amounts paid or payable to such Party for any and all services provided or to be provided by such Party pursuant to this Agreement as of the Day on which the claim arose; provided that the foregoing provisions shall not be deemed or construed as (A) imposing or allowing for any liability of either Party for (x) indirect, special or consequential damages as otherwise excluded pursuant to Section 10.4.4 below or (y) any other amount or nature of damages to the extent resulting directly and proximately from the claiming Party's failure to act at all relevant times in a commercially reasonable manner in compliance with such Party's duties of mitigation with respect to all applicable damages or (B) limiting either Party's right to recover appropriate refund(s) of or rebate(s) or credit(s) for fees, charges or other amounts paid at Agreement rates for services not performed or provided or otherwise failing to comply (with applicable refund, rebate or credit amounts measured by the diminution in value of services reasonably resulting from such noncompliance) with the applicable terms and conditions of this Agreement. Notwithstanding the foregoing, claims or suits for damages by either Party, any End User of either Party, or by any other person or entity, to the extent resulting from the gross negligence or willful misconduct of the other Party, shall not be subject to the foregoing limitation of liability.

ITEM NO. 5, ISSUE NO. G-5: *Should each Party be required to include specific liability-eliminating terms in all of its tariffs and End User contracts (past, present and future), and, to the extent that a Party does not or is unable to do so, should it be obligated to indemnify the other Party.* [GT&C, Section 10.4.2]

JOINT PETITIONERS' POSITION: Joint Petitioners should be able to offer commercially reasonable limitation-of-liability terms to their customers without being penalized by BellSouth by being forced to indemnify it. Joint Petitioners require this flexibility in negotiations in order to compete fairly with BellSouth in response to demands for custom contracts.

BELLSOUTH'S POSITION: If a CLEC elects not to limit its liability to its end users/customers in accordance with industry norms, the CLEC should bear the risk of loss arising from that business decision. BellSouth should be put in the same position it would be in if the CLEC end user was a BellSouth end user.

DISCUSSION

Witnesses Russell and Berlin (NuVox) and Falvey (Xspedius) testified to this issue for Joint Petitioners; witness Blake testified for BellSouth.

The degree of liability or indemnification obligations that any carrier undertakes in a contract is generally a matter of negotiation. Joint Petitioners demonstrate that they must often negotiate liability terms in order to win certain customers. FL Tr. at 205:7-11 (Russell); GA Tr. at 408:4-11 (Russell). They do not, however, plan to remove altogether the terms that would reasonably limit their liability. FL Tr. at 203:19-21 (Russell); GA Tr. at 406:17-19 (Russell); Russell Depo. Tr. at 82:9-15. In fact, at times Petitioners' limitation of liability are just as stringent as BellSouth's. GA Tr. at 406:13-16 (Russell). Petitioners merely seek the ability to

offer commercially reasonable, less stringent limitation of liability provisions without the indemnification penalty proposed by BellSouth. *See* JP Brief at 17.

Under BellSouth's proposed language, Petitioners must "indemnify and reimburse" BellSouth for any claim if they do not "provide in [their] tariffs and contracts with [their] End Users" limitation of liability language "the maximum extent permitted by Applicable Law." JP Brief, Exhibit A at 2. This provision would effectively require Petitioners to impose the most onerous liability limitations possible on South Carolina consumers, regardless of whether BellSouth adheres to such a standards. The Commission finds that this would prevent Petitioners from negotiating liability terms to any meaningful degree and inappropriately constrains the ability of Petitioners to offer more favorable service terms and conditions to consumers. In effect, BellSouth's language negates the benefits that competition was intended to bring to the South Carolina telecommunications market. We find that this language is not in the public interest.

We also find it relevant that BellSouth has never denied that it negotiates limitation-of-liability provisions in its custom contracts with customers that are less stringent than what is in its tariffs. SC Tr. at 407:13-20; GA Tr. at 999:11-12. For BellSouth to require Petitioners to adhere to BellSouth's tariffed liability language (or perhaps an even more stringent standard), even while BellSouth itself offers more advantageous terms to potential customers through its own custom service agreements, violates the nondiscrimination principles of Section 251 and constitutes an unfair and unwarranted barrier that will diminish Joint Petitioners' ability to compete effectively and fairly in South Carolina.

Finally, we reject BellSouth's argument that it should be put in the same position when Petitioners serve a customer as if BellSouth were serving that customer. In effect, BellSouth is

seeking to be insulated from the effects of local competition and in so doing would disrupt the federal regulatory scheme established by Sections 251 and 252 of the 1996 Act wherein monopolies are to be replaced with competitive markets in which all customers are no longer tied to the incumbent. The Commission cannot adopt BellSouth's position as it not only seeks to put BellSouth in its pre-1996 Act position, but it also seeks to put South Carolina consumers in that same position and in so doing would deny them the benefits of competition promised by the 1996 Act. Neither result would be consistent with the federal regulatory scheme or the public interest.

Carriers in a competitive market are entitled to negotiate the terms and conditions of service without the restraint of having to incur indemnification obligations to the dominant incumbent carrier. BellSouth's language, as proposed, would penalize Joint Petitioners for agreeing to any but the most stringent limitation of liability terms, which contravenes the purpose of competition and creates an unfair competitive advantage for BellSouth. Therefore, we reject BellSouth's language as contrary to the public interest and find that the Joint Petitioners' proposal (no contract language) is appropriate.

ITEM NO. 6, ISSUE NO. G-6: *Should limitation on liability for indirect, incidental or consequential damages be construed to preclude liability for claims or suits for damages incurred by CLEC's (or BellSouth's) End Users to the extent such damages result directly and in a reasonably foreseeable manner from BellSouth's (or CLEC's) performance obligations set forth in the Agreement?* [GT&C Section 10.4.4]

JOINT PETITIONERS' POSITION: The Agreement should be clear that damages to end users that result directly, proximately, and in a reasonably foreseeable manner from a party's

performance do not constitute "indirect, incidental, or consequential" damages. Petitioners should not be barred from recovering such damages subject to the Agreement's limitation of liability for negligence.

BELLSOUTH'S POSITION: What damages constitute indirect, incidental or consequential damages is a matter of state law at the time of the claim and should not be dictated by a party to an agreement. Petitioners' language is of no force and effect, and is confusing. Direct damages cannot be indirect, incidental or consequential.

DISCUSSION

Witnesses Russell and Berlin (NuVox) and Falvey (Xspedius) testified to this issue for Joint Petitioners; witness Blake testified for BellSouth.

This dispute centers on the definition of "indirect, incidental and consequential damages" that will govern under the agreement. JP Test. at 25:18 – 26:4. Such damages will not be covered by either party. Joint Petitioners have proposed language that would exclude damages that "result directly and in a reasonably foreseeable manner from the first Party's performance of services hereunder" from these non-covered damages. JP Brief Exhibit A. at 3. BellSouth agrees that direct damages should be compensated, but maintains that direct damages cannot be considered indirect. Blake Direct Test. at 20:4-9.

Further, in the post-1996 Act environment, BellSouth is required to provide network elements and services at wholesale to CLECs, who in turn serve their own customers. 47 U.S.C. §§ 251(a), 251(c). BellSouth is thus aware that its actions and omissions impact Joint Petitioners' customers. Any harm that Petitioners' or their customers suffer as a result of BellSouth's performance of the Agreement is therefore a direct and reasonably foreseeable consequence, and BellSouth should not be held harmless in such circumstances. Were this

agreement to eliminate BellSouth's liability for direct and reasonably foreseeable harm, it would either preclude South Carolina consumers from obtaining relief or force Petitioners to incur the costs of BellSouth's malfeasance or negligence.

Harm to the customers of a party caused by the party providing wholesale service are not deemed indirect, incidental, or consequential. Such harm is a foreseeable consequence of any contract in which one contracting party serves the general public. BellSouth is well aware that the services it provides to Joint Petitioners will impact not only Joint Petitioners but their End Users, as well.

We therefore find, contrary to BellSouth's position, that including Joint Petitioners' language in this section of the agreement is appropriate. Joint Petitioners' language provides a more precise definition of "indirect, incidental, or consequential" damages that are not covered and makes clear each party's potential exposure under this contract. JP Test. at 33-34. That definition in turn ensures that an aggrieved party may appropriately obtain relief from the service provider that caused them harm. While it may be the case that the rights of those who will be End Users cannot be affected by the terms of this contract, it is nonetheless a wise practice to ensure that the liability terms of this agreement are explicit and clear and that they may not be used in attempt to extinguish the rights of such End Users who have not contracted away such rights. Indeed, this practice may avoid unnecessary disputes during the life of the Agreement.

Joint Petitioners' proposed language for Section 10.4.2 ensures that "indirect, incidental or consequential damages" has a precise and clear meaning. Moreover, it ensures that any harm that they parties may cause to the other, or to the other's End Users, will be redressed by the appropriate party. Accordingly, we agree with the Joint Petitioners' position on this issue and adopt Joint Petitioner's language for this provision in Section 10.4.4:

> Nothing in this Section 10 shall limit a Party's obligation to indemnify or hold harmless the other Party set forth elsewhere in this Agreement. Except in cases of gross negligence or willful or intentional misconduct, under no circumstance shall a Party be responsible or liable for indirect, incidental, or consequential damages provided that neither the foregoing nor any other provision of this Section 10 shall be deemed or construed as imposing any limitation on the liability of a Party for claims or suits for damages incurred by End Users of the other Party or by such other Party vis-à-vis its End Users to the extent such damages result directly and in a reasonably foreseeable manner from the first Party's performance of services hereunder and were not and are not directly and proximately caused by or the result of such Party's failure to act at all relevant times in a commercially reasonable manner in compliance with such Party's duties of mitigation with respect to such damage. In connection with this limitation of liability, each Party recognizes that the other Party may, from time to time, provide advice, make recommendations, or supply other analyses related to the services or facilities described in this Agreement, and, while each Party shall use diligent efforts in this regard, the Parties acknowledge and agree that this limitation of liability shall apply to provision of such advice, recommendations, and analyses.

ITEM NO. 7, ISSUE NO. G-7: *What should the indemnification obligations of the parties be under this Agreement?* [GT&C Section 10.5]

JOINT PETITIONERS' POSITION: The Party receiving services should be indemnified, defended and held harmless by the Party providing services against any claims, loss or damage to the extent reasonably arising from or in connection with the providing Party's negligence (subject to limitation of liability for negligence), gross negligence or willful misconduct.

BELLSOUTH'S POSITION: The Party providing services should be indemnified, defended and held harmless by the Party receiving services against any claim, loss or damage arising from the receiving Party's use of the services provided under this Agreement pertaining to (1) claims for libel, slander or invasion of privacy arising from the content of the receiving Party's own communications, or (2) any claim, loss or damage claimed by the End User of the Party receiving services arising from such company's use or reliance on the providing Party's services,

actions, duties, or obligations arising out of this Agreement. This indemnification obligation shall not apply the extent any claims, loss, or damage is caused by the providing Party's gross negligence or willful misconduct.

DISCUSSION

Witnesses Russell and Berlin (NuVox) and Falvey (Xspedius) testified to this issue for Joint Petitioners; witness Blake testified for BellSouth.

The parties agree to indemnify each other for damages caused by a receiving party's unlawful conduct, such as libel, slander and invasion of privacy. Exhibit A at 4. The dispute before us in Item 7 is whether each Party must indemnify the other for damages caused by their own services or conduct.

In the context of utility services, it is customary that the party providing services indemnify the party receiving services for all damages that the service or service provider causes. JP Brief at 25. This principle is related to the rationale we explained above with respect to Item 4 (limitation of liability), that a party whose conduct causes injury should be responsible for that injury. Joint Petitioners' tariffs and contracts comport with this principle. JP Brief, Attachment 6 (NVX 00051-52); JP Brief, Attachment 1 (XSP 00004-5).

BellSouth's proposed language would require Joint Petitioners to indemnify BellSouth if BellSouth's negligent conduct were to cause injury to another party. This result places the risk of loss on the wrong party. In effect, it renders Joint Petitioners the insurance company of BellSouth, and divorces BellSouth from any liability for damages it causes. In addition, the wording of BellSouth's language is such that it could be read to require Joint Petitioners to defend BellSouth and hold BellSouth harmless for claims resulting from BellSouth's willful misconduct or gross negligence. This proposed language is inconsistent with BellSouth's own

position statement and contrary to sound public policy. We do not find the imposition of this sort of burden shifting to be in the public interest.

Joint Petitioners' proposed language requires a provisioning party to indemnify the receiving party for losses caused by the provisioner's negligent performance or unlawful conduct. Their language is structured parallel to that discussed in Item 4: there is no cap on indemnification for gross negligence or unlawful conduct, while damages for simple negligence is limited to 7.5% of billed amounts. We find that this proposal is reasonable in this context and that it strikes an appropriate balance between the need to protect the receiving party from liability and the need to limit a providing party's exposure for simple negligence. We note also that five State Commissions that have arbitrated this issue between BellSouth and the Joint Petitioners have found in Joint Petitioners' favor.[7]

We find that Joint Petitioners' language for Section 10.5 comports with industry practice and produces a fair result. It places the risk of loss on the appropriate party — the party being paid to provide a service. We also find that the 7.5% cap on indemnification for negligence is reasonable.

[7] *See Joint Petition of NewSouth Communications Corp. et al. for Arbitration with BellSouth Communications, Inc.*, Docket No. P-772, Sub 8 *et al*., Recommended Arbitration Order at 15-16 (N.C.U.C. July 26, 2005), *aff'd Order Ruling on Objections and Requiring the Filing of the Composite Agreement* at 11-12 (Feb. 8, 2006); *Joint Petition for Arbitration of NewSouth Communications Corp. et al. of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as amended*, Case No. 2004-00044, Order at 4-5 (KY P.S.C. March 14, 2006); *Joint Petition by NewSouth Communications Corp. et al. for Arbitration of Certain Issues Arising in Negotiation of an Interconnection Agreement with BellSouth Telecommunications, Inc.*, Docket No. 040130-TP, Final Order Regarding Petition for Arbitration at 11-13 (FL P.S.C. Oct. 11, 2005); *Joint Petition for Arbitration of NewSouth Communications Corporation et al. of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as amended*, Docket No. 18409-U, Order on Unresolved Issues at 7-9 (Ga. P.S.C. July 7, 2006); *Joint Petition for Arbitration of NewSouth Communications Corp. et al. of an Interconnection Agreement with BellSouth Telecommunications, Inc.*, Docket No. 04-00046, Transcript of Authority Conference at 9:25-12:18 (April 17, 2006) (final order not yet released).

BellSouth cannot require Joint Petitioners to bear through the imposition of indemnification obligations the risk of liability for damages caused by BellSouth's own conduct. Such a result is neither fair nor standard. Accordingly, we agree with the Joint Petitioners' position on this issue and adopt Joint Petitioners' proposed language for Section 10.5 of the General Terms and Conditions:

> Indemnification for Certain Claims. The Party providing services hereunder, its Affiliates and its parent company, shall be indemnified, defended and held harmless by the Party receiving services hereunder against any claim for libel, slander or invasion of privacy arising from the content of the receiving Party's own communications. The Party receiving services hereunder, its Affiliates and its parent company, shall be indemnified, defended and held harmless by the Party providing services hereunder against any claim, loss or damage to the extent arising from (1) the providing Party's failure to abide by Applicable Law, or (2) injuries or damages arising out of or in connection with this Agreement to the extent caused by the providing Party's negligence, gross negligence or willful misconduct.

ITEM NO. 9, ISSUE NO. G-9: *Should a court of law be included among the venues at which a Party may seek dispute resolution under the Agreement?* [GT&C Section 13.1]

JOINT PETITIONERS' POSITION: No legitimate dispute resolution venue should be foreclosed to the Parties and either Party should be able to petition the Commission, the FCC, or a court of competent jurisdiction for resolution of a dispute. The Commission should decline BellSouth's invitation to unlawfully strip state and federal courts of jurisdiction.

BELLSOUTH'S POSITION: This Commission or the FCC should initially resolve disputes as to the interpretation of the Agreement or as to the proper implementation of the Agreement. A party should be entitled to seek judicial review of any ruling made by the Commission or the FCC concerning this Agreement, but should not be entitled to take such disputes to a Court of law without first exhausting its administrative remedies.

DISCUSSION

Witness Russell and Berlin (NuVox) and Falvey (Xspedius) testified to this issue for Joint Petitioners, witness Kathy Blake testified for BellSouth.

Joint Petitioners seek to retain their fundamental legal right to seek resolution of disputes in a court of law. Their presently effective agreements include this right. GA Tr. at 1036:20 (Blake); FL Tr. at 965:14-16 (Blake). Thus, BellSouth is trying to take away a CLEC's right to seek dispute resolution in a court of competent jurisdiction that it historically has acknowledged and that the Joint Petitioners have preserved. We are unwilling to deny Joint Petitioners their right to preserve their ability to seek dispute resolution before a federal or state court of competent jurisdiction.

BellSouth's proposed language would permit disputes to be adjudicated in a court of law only "for such matters which lie outside the jurisdiction or expertise of the Commission or FCC." Exhibit at 5. According to BellSouth, the parties must come to agreement on this matter prior to the filing of any action. GA Tr. at 1056:12-17 (Blake). That the parties are unlikely to agree on this point is obvious, by virtue of this very issue being submitted for arbitration. Thus, BellSouth's proposed procedure invites delay and additional disputes. The Commission does not believe that approving such language would be efficient or in the public interest.

In the event that the parties cannot agree on a forum for dispute resolution, BellSouth's proposed language would force the parties to seek adjudication here or at the FCC. This language has the effect of removing Joint Petitioners' right to go to court altogether, so long as a forum dispute has been raised.

It is not clear that this Commission may issue an order approving agreement language that, over the objections of a party, deprives a court of jurisdiction. The subject matter

jurisdiction of South Carolina courts is set by the State Legislature. South Carolina Const. Art. V. For federal courts, Congress has granted full jurisdiction over cases involving a federal question or diversity. U.S. Const. Art. III, § 1. We therefore do not believe that we have the authority to approve agreement language that would prevent either BellSouth or Petitioners from seeking dispute resolution in a court of law. Whether a court of law may have jurisdiction over any particular claim is a matter to be adjudicated by the petitioned tribunal, and we need not at this time determine that matter.

The Commission does not believe that it would be in the public interest to adopt BellSouth's proposed language for General Terms and Conditions Section 13.1. We will not directly or indirectly attempt to circumscribe Joint Petitioners' rights to avail themselves of the state and federal court systems nor will we approve language that directly or indirectly circumscribes the jurisdiction of such courts. Accordingly, Petitioners' proposed language is adopted for Sections 13.1 of the General Terms and Conditions:

> Except as otherwise stated in this Agreement, the Parties agree that if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, either Party may petition the FCC, the Commission or a court of law for a resolution of the dispute. Either Party may seek expedited resolution by the Commission, and may request that resolution occur in no event later than sixty (60) calendar days from the date of submission of such dispute. The other Party will not object to such expedited resolution of a dispute. If the FCC or Commission appoints an expert(s) or other facilitator(s) to assist in its decision making, each party shall pay half of the fees and expenses so incurred to the extent the FCC or the Commission requires the Parties to bear such fees and expenses. Each Party reserves any rights it may have to seek judicial review of any ruling made by the FCC, the Commission or a court of law concerning this Agreement. Until the dispute is finally resolved, each Party shall continue to perform its obligations under this Agreement, unless the issue as to how or whether there is an obligation to perform is the basis of the dispute, and shall continue to provide all services and payments as prior to the dispute provided however, that neither Party shall be required to act in any unlawful fashion.

ITEM NO. 12, ISSUE NO. G-12: *Should the Agreement explicitly state that all existing state and federal laws, rules, regulations, and decisions apply unless otherwise specifically agreed to by the Parties?* [GT&C Section 32.2]

JOINT PETITIONERS' POSITION: Consistent with Georgia contract law, nothing in the Agreement should be construed to limit a Party's rights or exempt a Party from obligations under Applicable Law, as defined in the Agreement, except in such cases where the Parties have negotiated an express exemption or agreed to abide by other standards.

BELLSOUTH'S POSITION: This Agreement is intended to memorialize the Parties' mutual agreement with respect to their obligations under the Act and applicable FCC and Commission rules and orders. To the extent that either Party asserts that an obligation, right or other requirement, of Substantive Telecommunications law, not expressly memorialized in the Agreement is applicable to the Parties' by virtue of a reference to an FCC or Commission rule or order or Applicable Law in the Agreement, and such obligation, right or other requirement is disputed by the other Party, the Party asserting that such obligation, right or other requirement is applicable shall petition the Commission for resolution of the dispute and the Parties agree that any finding by the Commission that such obligation, right or other requirement exists shall be applied prospectively by the Parties upon amendment of the Agreement to include such obligation, right or other requirement and any necessary rates, terms and conditions. The Party that failed to perform such obligation, right or other requirement shall be held harmless from any liability for such failure until the obligation, right or other requirement is expressly included in this Agreement by amendment hereto.

DISCUSSION

Witnesses Russell and Berlin (NuVox) and Falvey (Xspedius) testified to this issue for Joint Petitioners; Blake testified for BellSouth.

This agreement, the parties concur, will be governed under the laws of Georgia without regard to conflicts of law principles. JP Test. at 47; SC Tr. at 445-46 (Examination of Blake). The prevailing law of contracts in Georgia is that all laws and regulations that are effective at the time of execution are deemed incorporated into the contract, *Magnetic Resonance Plus, Inc. v. Imaging Systems Int'l*, 273 Ga. 525, 543 S.E.2d 32, 34-35 (2001), unless specifically repudiated or waived. *Jenkins v. Morgan*, 100 Ga. App. 561, 112 S.E.2d 23, 24 (1959).

BellSouth's proposed language for Section 32.2 directly contravenes this principle, stating that no right shall apply to the agreement unless "expressly memorialized herein." Exhibit A at 6. BellSouth witness Blake could not explain satisfactorily why this apparent conflict is permissible. SC Tr. at 446, 448. We therefore cannot conclude that BellSouth's position comports with Georgia law, which is the body of law that will by the parties own agreement govern.

BellSouth apparently offered revised language more recently that would exclude any right in "substantive Telecommunications law." Exhibit A at 6. Yet this Agreement is overwhelmingly comprised of such law, and thus BellSouth's concession would still exclude telecommunications law from the Agreement unless it is expressly referenced or reproduced therein. As such, the Agreement would remain in contravention of Georgia law by creating a rule of implied exceptions where none were negotiated. We find that such an approach would itself constitute an exception to the already agreed upon selection of Georgia contract law as governing law and we are unable to impose such an exception as it has not been negotiated and is

not otherwise required by Sections 251 or 252 of the Act. We also find that adopting a proposal that would make compliance with the applicable laws and regulations of this state and Commission prospective only upon specific Commission mandate in response to a complaint or series of complaints filed by an aggrieved party to be contrary to the public interest.

We find that the law of Georgia, which will govern interpretation of this agreement, incorporates into contracts all statutes and regulations in existence unless expressly waived, repudiated or displaced by conflicting law. In addition, we find that requiring the parties to articulate and identify all applicable law is unnecessarily cumbersome. Accordingly, we agree with the Joint Petitioners' position on this issue and adopt Joint Petitioners' language for Section 32.2:

> Nothing in this Agreement shall be construed to limit a Party's rights or exempt a Party from obligations under Applicable Law, except in such cases where the Parties have explicitly agreed to an exception to a requirement of Applicable Law or to abide by provisions which conflict with and thereby displace corresponding requirements of Applicable Law. Silence shall not be construed to be such an exemption to or displacement of any aspect, no matter how discrete, of Applicable Law.

ITEM NO. 65, ISSUE NO. 3-6: *Should BellSouth be allowed to charge the CLEC a Tandem Intermediary Charge for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic?* [Attachment 3, Section 10.10.1 (NuVox)]

JOINT PETITIONERS' POSITION: BellSouth may not impose upon Joint Petitioners a new non-cost-based, unjustified, and discriminatory Transit Intermediary Charge ("TIC") for transit traffic in addition to the TELRIC tandem switching and common transport charges the Parties already have agreed will apply to transit traffic. The TIC is a "tax" that is unlawful, unjustified and discriminatory.

BELLSOUTH'S POSITION: BellSouth is not obligated to provide the transit function and the CLEC has the right pursuant to the Act to request direct interconnection to other carriers. Additionally, BellSouth incurs costs beyond those for which the Commission ordered rates were designed to address, such as the costs of sending records to the CLECs identifying the originating carrier. BellSouth does not charge the CLEC for these records and does not recover those costs in any other form. Moreover, this issue is not appropriate for arbitration in this proceeding because it involves a request by the CLECs that is not encompassed within BellSouth's obligations pursuant to Section 251 of the Act.

DISCUSSION

Witnesses Willis (NuVox) and Falvey (Xspedius) testified to this issue for Joint Petitioners; witness Blake testified for BellSouth.

This issue regards a charge that BellSouth seeks to impose related to its provision of transiting service between Joint Petitioners and other carriers. BellSouth has agreed in this negotiation to carry transit traffic on Petitioners' behalf. The TIC is distinct from and in addition to the existing tandem switching and common transports charges that Joint Petitioners pay for such traffic. Joint Petitioners do not pay a TIC under their existing interconnection agreements. JP Direct Test. at 72:10 (BellSouth "has recently developed the TIC" since creation of existing agreements).

There is some confusion in the record as to the amount that BellSouth requests as a TIC charge. It appears that initially BellSouth proposed a $.0015 per-minute rate in addition to the switching and transport charges that are already paid by Petitioners and are included in this new Agreement. GA Tr. at 1105:15-17 (Blake). More recently BellSouth has proposed that Petitioners pay a combined rate of $.0025 per minute for transiting service, which includes

switching, transport, and the additional premium BellSouth seeks to collect. *Id*. at 1105:18-24 (Blake). Joint Petitioners have objected to this new proposal on the ground that it was not negotiated and would require excising existing, agreed-upon language from the Agreement. JP Test. at 73; JP Brief at 40-42. We agree that the new combined TIC rate has not been raised appropriately for arbitration, and therefore we will review only BellSouth's initial proposal of $.0015 per minute.

BellSouth's position is that its provision of transiting service is optional, and that if Petitioners choose to use that service they must pay the TIC. Blake Direct Test. at 34:20- 35:13. This position is without merit, however, as BellSouth has agreed to provide transiting service in this Agreement. In fact, many State Commissions have held that transiting traffic is an obligation under Section 251, including the North Carolina Utilities Commission and the Texas Public Utilities Commission. *See* Rebuttal Testimony of Joint Petitioners at 59:3-11 (May 23, 2005). More recently, within this arbitration, the North Carolina, Tennessee and Kentucky Commissions each held that BellSouth's attempt to impose the additional TIC charge is improper.[8]

Further, BellSouth's argument that Petitioners can either obtain transiting service or provision it themselves is unavailing. *See* Blake Test. at 35. The only competitive transiting service provider of which the parties are aware, Neutral Tandem, does not provide service in South Carolina. SC Tr. at 468:19 – 469:4 & Hearing Exhibit 4. And to require Petitioners to self-provision transiting would impose an insuperable burden, entailing the total replication of

[8] *North Carolina Recommended Arbitration Order* at 52-54, *aff'd Order Ruling on Objections* at 47-48; *TRA Conference Transcript* at 25-27; *KY Final Order* at 18-19.

the local network including hundreds of points of interconnection. In essence, Petitioners have no practical option but to use BellSouth's legacy tandem network to transit traffic.

The proposed TIC is admittedly an "additive rate," GA Tr. at 1003:5-8 (Blake), which, according to BellSouth recovers primarily the costs of producing records to third party terminating carriers that identify the carrier originating transited traffic. SC Tr. at 470:2-6 (Blake). BellSouth maintains that the TIC should not be set in accordance with TELRIC principles. Blake Direct Test. at 34:20-22. BellSouth has testified that a TIC rate set at TELRIC would "penalize" BellSouth. *Id*. at 35:1. BellSouth has not submitted any supporting data regarding the unsubstantiated costs that the TIC is intended to recover. Moreover, BellSouth does not believe that this Commission has the authority to set a TIC rate. FL Tr. at 1004:11-15 (Blake); JP Brief, Attachment 11 (excerpt of BellSouth Post-Hearing Brief to Georgia Commission).

Petitioners have explained that they do not need or request the records for which BellSouth seeks to recover costs through the TIC. JP Test. at 73; JP Brief at 45-46. Such records identify the originating carrier for whom transiting is performed — in this case, the Joint Petitioners themselves are the originators. GA Tr. at 1107:11-24 (Blake). Joint Petitioners also argue that it is inappropriate for BellSouth to charge them for services not requested or provided to third parties. JP Brief at 45-46. We agree.

Based on this evidence, we find that we are unable to require Joint Petitioners to pay a TIC charge. BellSouth has not provided any cost information regarding the TIC, and has stated that we lack authority to set a TIC rate. Joint Petitioners do not in fact require the additional services for which BellSouth seeks to impose the TIC. *Id*. In addition, it is not in dispute that Joint Petitioners presently pay and will continue to pay a the Commission's TELRIC-compliant

tandem switching and common transport (if applicable) charges in connection with transiting traffic. JP Brief at 42.

There is nothing in the record to set a basis for establishing a TIC that would be in compliance with the FCC's TELRIC principles, or any other. Accordingly, BellSouth's proposed language and associated rate for this issue is accordingly rejected and the language proposed by Joint Petitioners shall be adopted for Section 10.10.1 of Attachment 3:

> Each Party shall provide tandem switching and transport services for the other Party's Transit Traffic. Rates for Local Transit Traffic and ISP-Bound Transit Traffic shall be the applicable Call Transport and Termination charges (i.e., common transport and tandem switching charge; end office switching charge is not applicable) as set forth in Exhibit A to this Attachment. Rates for Switched Access Transit Traffic shall be the applicable charges as set forth in the applicable Party's Commission approved Interstate or Intrastate Switched Access tariffs as filed and effective with the FCC or Commission, or reasonable and non-discriminatory web-posted listing if the FCC or Commission does not require filing of a tariff. Billing associated with all Transit Traffic shall be pursuant to MECAB guidelines.

ITEM NO. 86, ISSUE NO. 6-3: *(B) How should disputes over alleged unauthorized access to CSR information be handled under the Agreement?* [Attachment 6, Sections 2.5.6.2 & 2.5.6.3]

JOINT PETITIONERS' POSITION: (B) If one Party disputes the other Party's assertion of non-compliance, that Party should notify the other Party in writing of the basis for its assertion of compliance. If the receiving Party fails to provide the other Party with notice that appropriate corrective measures have been taken within a reasonable time or provide the other Party with proof sufficient to persuade the other Party that it erred in asserting the non-compliance, the requesting Party should proceed pursuant to the Dispute Resolution provisions set forth in the General Terms and Conditions and the Parties should cooperatively seek expedited resolution of the dispute. "Self help", in the form of suspension of access to ordering systems and

discontinuance of service, is inappropriate and coercive. Moreover, it effectively denies one Party the ability to avail itself to the Dispute Resolution process otherwise agreed to by the Parties.

BELLSOUTH'S POSITION: (B) The Party providing notice of such impropriety should provide notice to the offending Party that additional applications for service may be refused, that any pending orders for service may not be completed, and/or that access to ordering systems may be suspended if such use is not corrected or ceased by the fifth (5^{th}) calendar day following the date of the notice. In addition, the alleging Party may, at the same time, provide written notice to the person(s) designated by the other Party to receive notices of noncompliance that the alleging Party may terminate the provision of access to ordering systems to the other Party and may discontinue the provisioning of existing services if such use is not corrected or ceased by the tenth (10^{th}) calendar day following the date of the initial notice. If the other Party disagrees with the alleging Party's allegations of unauthorized use, the other Party shall proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions.

DISCUSSION

Witnesses Russell and Berlin (NuVox) and Falvey testified to this item for Joint Petitioners. Scot Ferguson testified for BellSouth.

This item is about whether disputes over unauthorized access to CSR information should be excepted from the Agreement's dispute resolution provisions. Both parties agree that CSR information contains customer proprietary network information which may not be accessed without a letter of authorization from the customer. JP Brief at 47; Direct Testimony of Scot Ferguson at 3 (May 11, 2005). BellSouth has proposed a menu of debilitating sanctions it would impose for any allegation by BellSouth of unauthorized access by Joint Petitioners.

Ferguson Test. at 2-3. Under its proposal, BellSouth could refuse to accept new orders. Ferguson Test. at 3. It could also suspend any pending orders, and access to ordering and provisioning systems (thus, closing off Joint Petitioners' ability to serve the needs of existing customers, as well as potential new ones). *Id*. Ultimately, BellSouth could terminate all services provided to Joint Petitioners, no matter how unrelated to the unproven allegations of unauthorized access to CSRs. SC Tr. at 482 (Examination of Ferguson). The disruption to Joint Petitioners' business operations from such a sanction is obvious. Joint Petitioners have proposed that the offended party first notify the other party of the alleged unauthorized access and that the parties attempt to resolve the matter themselves. JP Test. at 77; JP Rebuttal Test. at 62. If unsuccessful, Joint Petitioners ask that the Agreement's standard dispute resolution provisions apply. JP Test. at 76; JP Rebuttal Test. at 62.

BellSouth has not met its burden of proof on this item. We find no evidence to support the inclusion of the self-help remedy BellSouth has proposed. We find that the Joint Petitioners' proposal affords sufficient protection for all. Therefore, we find no basis to deviate from the Agreement's standard dispute resolution provision here.

The Commission concludes that disputes over unauthorized access to CSR information should be resolved by resorting to the standard dispute resolution provisions in the General Terms and Conditions section of the Agreement. We agree with the Joint Petitioners' position on this issue and adopt Joint Petitioners proposed language for Sections 2.5.5.2 and 2.5.5.3 of Attachment 6:

> Notice of Noncompliance. If, after receipt of a requested LOA, the requesting Party determines that the other Party has accessed CSR information without having obtained the proper end user authorization, or, if no LOA is provided by the seventh (7th) business day after such request has been made, the requesting Party will send written notice by email to all notice recipients designated in the

General Terms and Conditions to the other Party specifying the alleged noncompliance.

Disputes over Alleged Noncompliance. In its written notice to the other Party (with an additional copy to be sent by email to all notice recipients designated in the General Terms and Conditions), the alleging Party may state that additional applications for service may be refused, that any pending orders for service may not be completed, and/or that access to ordering systems may be suspended if such use is not corrected or ceased by the fifth (5th) calendar day following the date of the notice. In addition, the alleging Party may, at the same time, provide written notice (with an additional copy to be sent by email to all notice recipients designated in the General Terms and Conditions) to the person designated by the other Party to receive notices of noncompliance that the alleging Party may terminate the provision of access to ordering systems to the other Party and may discontinue the provisioning of existing services if such use is not corrected or ceased by the tenth (10th) calendar day following the date of the initial notice. BellSouth will not invoke any remedy specified in this Section unless its allegations pertain to systemic rather than isolated instances of unauthorized access to CSR information and unless it first provides notice to the Commission of its intent to impose such remedies. If the other Party disagrees with the alleging Party's allegations of unauthorized use, the alleging Party shall not invoke any remedy specified in this paragraph and shall instead proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions. All such information obtained through the process set forth in this Section 2.5.5 shall be deemed Information covered by the Proprietary and Confidential Information Section in the General Terms and Conditions of this Agreement.

ITEM NO. 97, Issue No. 7-3: *When should payment of charges for service be due?* [Attachment 7, Section 1.4]

JOINT PETITIONERS' POSITION: Payment of charges for services rendered should be due thirty calendar days from receipt or website posting of a complete and fully readable bill or within thirty calendar days from receipt or website posting of a corrected or retransmitted bill, in those cases where correction or retransmission is necessary.

BELLSOUTH'S POSITION: Payment for services should be due on or before the next bill date (Payment Due Date) in immediately available funds.

DISCUSSION

Witnesses Russell and Berlin (NuVox) and Falvey (Xspedius) testified to this item for Joint Petitioners; witness Blake testified for BellSouth.

Joint Petitioners propose that section 1.4 of Attachment 7 of the Agreement provide for payment of charges for services be due 30 calendar days from receipt or posting of a complete and fully readable bill. JP Test. at 81-82. BellSouth proposes that payment be due on or before the next bill date in immediately available funds. Blake Test. at 39.

Joint Petitioners have testified that they (1) receive a large number of bills from BellSouth monthly which are voluminous and complex; (2) these bills are often incomplete and sometimes incomprehensible; and (3) that there is often a long gap between the bill issue date and the date the BellSouth bill is actually posted or received by Joint Petitioners. JP Direct Test. at 81:9-82:3; GA Tr. at 592:8-17. There was testimony that Joint Petitioners do not receive their electronic bills from BellSouth for periods ranging from 2 to 22 days. JP Direct Test. at 82:17-22. Generally the Petitioners have only 22 days to review and pay a BellSouth invoice, because the time for a bill to reach Joint Petitioners averages 7 days. GA Tr. at 514:7-10 (Russell). In addition, Petitioners testified that it often takes several weeks to review the BellSouth bills because of their volume and complexity. JP Direct Test. at 81:21-82:1. By contrast, BellSouth witness Carlos Morillo, who was previously designated as the witness for Item 97, has testified that BellSouth pays the bills it receives from Joint Petitioners within 30 days of receipt, and not the date the invoice was sent. JP Brief, Attachment 19 (excerpt of Morillo Testimony).

Several other State Commissions have recently reviewed this issue. The Alabama, Georgia, North Carolina and Tennessee arbitration decisions in the interconnection arbitrations brought by ITC^DeltaCom held that CLECs should have a reasonable time period for reviewing

and paying bills. The Alabama Commission arbitration panel held (in Docket 28841) that ITC must have 30 days to pay BellSouth invoices marked from date of receipt, and the Georgia Commission has held (in Docket 16583-U) that CLECs should be given 30 days from the date the bill is sent out. As to these Petitioners, who receive the vast majority of their bills electronically, FL Tr. at 417:1-3 (Mertz), these two holdings essentially require a 30-day payment cycle marked from date of receipt.

In addition, three State Commissions have held that BellSouth's proposed payment deadline is inappropriate for these Petitioners. The Kentucky Commission held that NuVox and Xspedius must have 30 days to pay marked from the date of posting, and the Georgia Commission held that they must have 30 days marked from the date of mailing.[9] We find that this result is also appropriate for this arbitration.

The Commission concludes that the payment due date should be 30 days from the date of receipt of the bill. Accordingly, the Commission requires Joint Petitioners and BellSouth to amend the proposed language for Section 1.4 of Attachment 7 to conform to this decision:

> Payment Due. Payment of charges for services rendered will be due thirty (30) calendar days from receipt or website posting of a complete and fully readable bill or within thirty (30) calendar days from receipt or website posting of a corrected or retransmitted bill in those cases where correction or retransmission is necessary for processing and is payable in immediately available funds. Payment is considered to have been made when received by the billing Party.

ITEM NO. 100, ISSUE NO. 7-6: *Should CLEC be required to calculate and pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination?* [Attachment 7, Section 1.7.2]

[9] *KY Final Order* at 21-22; *Georgia Order* at 29-31. The North Carolina Commission granted Petitioners 26 days to pay BellSouth invoices, marked from the date of receipt. *NC Order Ruling on Objections* at 62;

JOINT PETITIONERS' POSITION: Petitioners should not be required to calculate and pay past due amounts in addition to those specified in dollars and cents on BellSouth's notice of suspension/termination for nonpayment in order to avoid suspension or termination. Otherwise, Petitioners will risk suspension or termination due to possible calculation and timing errors.

BELLSOUTH'S POSITION: If a CLEC receives a notice of suspension or termination from BellSouth as a result of CLEC's failure to pay timely, CLEC should be required to pay all amounts that are past due as of the date of the pending suspension or termination action.

DISCUSSION

Witnesses Russell and Berlin (NuVox) and Falvey (Xspedius) testified to this issue for Joint Petitioners; witness Blake testified for BellSouth.

In its proposed language for Section 1.7.2 of Attachment 7, BellSouth seeks the right to suspend or terminate a Petitioner's service if they fail, after receiving a Notice of Suspension ("Notice") for nonpayment, to pay the amount due on the Notice and any other amounts that may become past due on any account after the date of the Notice. JP Brief, Exhibit A at 11. Thus if one account held by a Petitioner is not paid within 31 days on the date of an invoice, the Petitioner must within 15 days pay that amount, plus any other amount that may become late on any account (which will not appear on the Notice) within 15 days, in order to avoid suspension of ordering access. Failure to pay all amounts within 30 days may result in outright termination of service. *Id.* at 53.

Joint Petitioners' language for Section 1.7.2 also requires them to remain current on invoices, and includes provisions for suspension or termination of service, but requires that any Notice state exactly the amount due "in dollars and cents" that must be paid. JP Brief, Exhibit A

at 11. It contains the same deadlines: failure to pay the amount due within 15 days may result in order suspension, and failure to pay within 30 days may result in service termination. *Id*.

Joint Petitioners each have numerous accounts with BellSouth. SC Tr. at 498:11; JP Brief at 49 (NuVox over 1100 bills per month; Xspedius over 500 bills per month). Each account, if not paid in 31 days, automatically generates a Notice. BellSouth witness Kathy Blake has testified that any one Notice will pertain to a single account and will state only the amount due on the one account from which it issued. Blake Test. at 43-44. Amounts due will not be consolidated in the Notice. *Id*. This situation requires Joint Petitioners to calculate for themselves the exact amount due on all accounts on any given date, and pay it promptly to avoid losing service. JP Brief at 56-58. Yet BellSouth, as the creditor on all of these accounts, has the ability to calculate the amounts that it is owed.

BellSouth offers the following language that it believes will resolve Petitioners' concern: "[u]pon request, BellSouth will provide information to [Petitioner] of the Additional Amounts Owed." JP Brief, Exhibit A at 11. Petitioners argue that this language does not fully address the concern that service may be shut down if they fail to calculate correctly what they must pay in response to a Notice. JP Brief at 57-58. That is, it is unclear the extent of the information that Joint Petitioners will receive. Further, these reports are stamped with the legend "Not An Official BellSouth Document," which raises doubts as to whether Petitioners may rely on them with confidence. SC Tr. at 537:11-19. And were Petitioners to remit the incorrect amount, their service – and that of South Carolina consumers – could be terminated. JP Brief at 53.

Service termination is an extremely serious matter. If BellSouth terminates Petitioners' service, then South Carolina consumers will necessarily lose service. We cannot give BellSouth the discretion to impose this penalty when it places on Petitioners the onus of calculating "the

amount on the notice, plus any additional amounts that have become past due." This burden is unfair and carries too great a risk of mistakes or manipulation - resulting in service termination not only to Petitioners, but to South Carolina consumers, as well.

We find that BellSouth's language is unnecessary to ensure that its invoices are paid. BellSouth's proposal involves guesswork as to whether disputes will be properly and timely recognized, and as to when BellSouth will recognize receipt of payment. The opportunity for error and possible gamesmanship created by BellSouth's proposal is unreasonable, unacceptable and contrary to the public interest. Joint Petitioners' language, which requires that BellSouth tell a Petitioner exactly what it owes "in dollars and cents" is a more equitable and sensible way to deal with late payments.

BellSouth should not reserve the right to suspend or terminate Joint Petitioners' service, and thus South Carolina consumers' service, based on a provision that forces the Petitioners to guess at the amount that they must pay to avoid termination. BellSouth is the more appropriate party to calculate all amounts due and state that amount clearly to Petitioners. We therefore agree with the Joint Petitioners' position on this issue and adopt Joint Petitioners' proposed language for Section 1.7.2 of Attachment 7:

> Each Party reserves the right to suspend or terminate service for nonpayment. If payment of amounts not subject to a billing dispute, as described in Section 2, is not received by the Due Date, the billing Party may provide written notice to the other Party that additional applications for service may be refused, that any pending orders for service may not be completed, and/or that access to ordering systems may be suspended if payment of such amounts, as indicated on the notice in dollars and cents, is not received by the fifteenth (15th) calendar day following the date of the notice. In addition, the billing Party may, at the same time, provide written notice that the billing Party may discontinue the provision of existing services to the other Party if payment of such amounts, as indicated on the notice (in dollars and cents), is not received by the thirtieth (30th) calendar day following the date of the Initial Notice.

ITEM No. 101, ISSUE NO. 7-7: *How many months of billing should be used to determine the maximum amount of the deposit?* [Attachment 7, Section 1.8.3]

JOINT PETITIONERS' POSITION: The maximum deposit should not exceed one month's billing for services billed in advance and two months' billing for services billed in arrears (as in the new DeltaCom/BST Agreement). Alternatively, the maximum deposit should not exceed two months' estimated billing for new CLECs or one and one-half month's actual billing for existing CLECs.

BELLSOUTH'S POSITION: The average of two (2) months of actual billing for existing customers or estimated billing for new customers, which is consistent with the telecommunications industry's standard and BellSouth's practice with its end users.

DISCUSSION

Witnesses Russell and Berlin (NuVox) and Falvey (Xspedius) testified to this issue for Joint Petitioners; witness Blake testified for BellSouth.

Service deposits are necessary to mitigate BellSouth's financial risk in certain circumstances. Blake Rebuttal Test. at 46:6-15. BellSouth has several criteria by which CLEC deposit amounts are set, which includes payment history, liquidity, and bond rating. Agreement, Attachment 7, Section 1.8.5. These criteria are not in dispute. JP Brief at 60.

Joint Petitioners argue that being required to post excessive deposits places them at a competitive disadvantage. *Id.* at 61. Deposits by their nature tie up capital, thus constraining Petitioners' ability to increase funding dedicated to facilities deployment or service innovations. JP Direct Test. at 89:14-15. Joint Petitioners also argue that they have stable and longstanding

business relationships with BellSouth, thus considerably decreasing BellSouth's risk. *Id*. at 89:17-19.

Petitioners also note that BellSouth, throughout the region, has agreed to a one-month maximum deposit provision with ITC^DeltaCom for services paid in advance and a maximum of two months for services paid in arrears. JP Brief, Attachment 22 As a matter of parity and nondiscrimination, Joint Petitioners are entitled to the same treatment, unless BellSouth can demonstrate good cause to require different terms. 47 U.S.C. § 251(c)(2); 47. C.F.R. § 51.313; *Local Competition First Report and Order*, 11 FCC Rcd. at 15614 ¶ 224.

BellSouth has not shown that Joint Petitioners should not receive the same treatment. This Agreement entails much the same services and elements that are provided in the ITC^DeltaCom agreement, particularly the provision of UNEs that are billed in advance. Deposition of Carlos Morillo at 198:9-14 (Dec. 10, 2004). BellSouth has already agreed that these provisions are reasonable. Accordingly, we find that Joint Petitioners should be subject to no more onerous maximum deposit provision.

We conclude that BellSouth's financial risk is properly addressed by the maximum deposit provision already agreed to with ITC^DeltaCom. Thus, Section 1.8.3 of Attachment 7 should provide for a maximum deposit of up to one month's billing for service paid in advance, and up to two months' billing for services paid in arrears:

> The amount of the security shall not exceed one (1) month's billing for services billed in advance and two (2) month's billing for services billed in arrears (based on average monthly billings for the most recent six (6) month period; based on good faith estimates for new CLECs). Interest shall accrue per the appropriate BellSouth tariff on cash deposits.

ITEM No. 102, ISSUE NO. 7-8: *Should the amount of the deposit BellSouth requires from CLEC be reduced by past due amounts owed by BellSouth to CLEC?* [Attachment 7, Section 1.8.3.1]

JOINT PETITIONERS' POSITION: Because BellSouth's payment history with CLECs is often poor, the amount of deposit due, if any, should be reduced by amounts past due to CLEC by BellSouth. BellSouth may request additional security in an amount equal to such reduction once BellSouth demonstrates a good payment history, as defined in the Agreement.

BELLSOUTH'S POSITION: A CLEC's remedy for addressing late payment by BellSouth should be suspension or termination of service or the application of interest and late payment charges, similar to BellSouth's remedy for addressing late payment by CLEC.

DISCUSSION

Witnesses Russell and Berlin (NuVox) and Jim Falvey (Xspedius) testified to this issue for Joint Petitioners; witness Blake testified for BellSouth.

This issue regards whether the deposit owed to BellSouth should be set off or reduced by the amounts that BellSouth owes past due to Joint Petitioners. Testimony plainly indicates that BellSouth is not always timely in paying or disputing Joint Petitioner bills. JP Rebuttal Test. at 75:6-16; SC Tr. at 552:15-24.

BellSouth has no obligation to pay a deposit to Joint Petitioners to mitigate their risks of nonpayment. JP Direct Test. at 91:11-13. In addition, Joint Petitioners presently have no ability to reduce the amount of the deposit requested from BellSouth based on amounts that BellSouth has failed to timely pay. *Id.* at 92:16-17. Joint Petitioners argue that this inequity essentially

forces them to go out of pocket twice: once to pay the deposit, and again in being denied revenue that they are owed. JP Brief at 64.

Joint Petitioners have proposed language that would impose on BellSouth an obligation to establish a good payment history or reduce the amount of deposit it would otherwise be entitled to obtain from Joint Petitioners. JP Brief, Exhibit A at 12. Petitioners' deposit would be decreased by amounts unpaid for more than 30 days. *Id*. Once BellSouth demonstrates a good payment history, as defined by the undisputed language of Section 1.8.5.1 of Attachment 7, the off-set amount would be restored in the form of an increased deposit. JP Direct Testimony at 91:8-11.

Petitioners argue that a deposit offset is necessary in order to mitigate the financial burden of having to both remit a deposit and incur late payment by BellSouth for services rendered. JP Direct Test. at 91:6-10. Petitioners state that BellSouth has historically exhibited a poor payment history, which substantially diminishes its need to retain further funds as a financial guarantee. JP Direct Test. at 92:6-7.

Other State Commissions have found deposit offsets to be a reasonable means of apportioning financial risk, as well as a necessary step toward establishing basic fairness. Recent arbitration decisions in both Kansas and Oklahoma have included an order that SBC must decrease its deposit demand by the amounts it owes the CLEC. *In the Matter of the Petition of the CLEC Coalition for Arbitration against Southwestern Bell Telephone, L.P. d/b/a SBC Kansas under Section 252(b) of the Telecommunications Act of 1996*, Docket No. 05-BTKT-365-ARB), Arbitrator's Determination of Issues (Kan. Corp. Comm'n Feb. 16, 2005) and Decision of Administrative Law Judge, Oklahoma Corporation Commission Docket No. 2004-493 (Apr. 12, 2005). Under these decisions, SBC may require a deposit once it is current with its payments.

We find that Joint Petitioners' language is reasonable and in the public interest. To allow BellSouth to both impose deposit obligations while failing to timely pay Joint Petitioners the amounts they are owed places too great a financial burden on competitors. Moreover, it is plainly inequitable to permit BellSouth to avoid payment obligations and the seek deposits, as Joint Petitioners would twice be deprived of working capital necessary for them to compete effectively. *See* Item 101 above.

We conclude that it is just and reasonable to require that deposits be reduced by amounts past due to Joint Petitioners until such time as BellSouth is able to demonstrate a prompt payment history according to the same definition BellSouth applies to Joint Petitioners. We accordingly agree with the Joint Petitioners' position on this issue and adopt Joint Petitioners' proposed language for Attachment 7, Section 1.8.3.1:

> The amount of security due from <<customer_short_name>> shall be reduced by amounts due to <<customer_short_name>> by BellSouth aged over thirty (30) calendar days. BellSouth may request additional security in an amount equal to such reduction once BellSouth demonstrates a good payment history, as defined in Section 1.8.5.1, and subject to the standard set forth in Section 1.8.5.

ITEM No. 103, ISSUE NO. 7-9: *Should BellSouth be entitled to terminate service to CLEC pursuant to the process for termination due to non-payment if CLEC refuses to remit any deposit required by BellSouth within 30 calendar days?* [Attachment 7, Section 1.8.6]

JOINT PETITIONERS' POSITION: BellSouth should be permitted to terminate services for failure to remit a requested deposit **only** if: (a) CLEC agrees that the deposit is required, or (b) the Commission has ordered payment of the deposit. As agreed to by the parties, **all** deposit disputes will be resolved via the Agreement's Dispute Resolution provisions and not through "self-help".

BELLSOUTH'S POSITION: Thirty (30) calendar days is a commercially reasonable time period within which a CLEC should have met its fiscal responsibilities, and termination is an appropriate response to nonpayment of a deposit.

DISCUSSION

Witnesses Russell and Berlin (NuVox) and Falvey (Xspedius) testified to this item for Joint Petitioners; witness Scot Ferguson testified for BellSouth.

In this item, BellSouth seeks to include language in the Agreement that would permit it to terminate Joint Petitioners' service based on a failure to remit any requested deposit in 30 days. *See* JP Ex. A at 13. BellSouth represents that this provision would apply in cases where a CLEC fails to respond to or dispute a deposit request. Ferguson Direct Test. at 7:5-9.

Joint Petitioners' existing agreements do not have this type of provision in them. GA Tr. at 597:13-16 (Russell); FL Tr. at 259:14-17 (Russell). This termination provision would apply in cases where no agreement on a deposit is reached and in cases where no response to a deposit request is received. Deposit disputes are governed by the Dispute Resolution process set forth in the agreement. GA Tr. at 728:8-10 (Ferguson).

Deposit disputes are not uncommon as between BellSouth and Joint Petitioners. FL Tr. at 260:15-21 (Russell). While the criteria to be used for determining the amount of a deposit are not in dispute here, *see* Item 101 above, the parties' application of those criteria may differ in a material way and result in a legitimate dispute. GA Tr. at 542:19-21 (Russell). *See also id*. at 540:10-14 (BellSouth refunded $800,000 of NuVox's deposit). It is not in the public interest to permit BellSouth to terminate Joint Petitioners' service — thus cutting off all of Joint Petitioners' customers — based on such disputes.

We also find that it is contrary to the public interest to permit termination for failure to pay a requested deposit that has not been agreed to or deemed appropriate by this Commission. Since termination is a drastic measure that could severely impact Joint Petitioners and the consumers who rely on their services, we find that it would be inappropriate for a single party to take such remedial action prior to establishing why no response was received or whether the deposit request was reasonable in the first place.

As a more general manner, we find that terminating service for 30 days' failure to remit a requested deposit is contrary to the public interest. Such a result could have a serious and irreparable effect on public safety — for example, if service to hospitals or police departments were impacted — that BellSouth itself acknowledges. FL Tr. at 781:13 – 782:1 (Ferguson). Moreover, termination is not a proportionate response to a dispute over or failure to agree or respond to a request for a deposit.

Joint Petitioners and their customers should not be placed at risk when the parties fail to agree over the proper amount of a deposit. Instead, the parties should resort to the Agreement's standard dispute resolution provisions. We accordingly agree with the Joint Petitioners' position on this issue and adopt Joint Petitioners' proposed language for Section 1.8.6 of Attachment 7:

> The amount of security due from <<customer_short_name>> shall be reduced by amounts due to <<customer_short_name>> by BellSouth aged over thirty (30) calendar days. BellSouth may request additional security in an amount equal to such reduction once BellSouth demonstrates a good payment history, as defined in Section 1.8.5.1, and subject to the standard set forth in Section 1.8.5.

CONCLUSION

The parties are directed to implement the Commission's resolution of the issues addressed in this Order by modifying the language of the Interconnection Agreement to the extent

necessary to comply with the rulings established herein. The Parties shall file an Agreement with the Commission within sixty (60) days after receipt of this Order. If the parties are unable, after good faith efforts, to mutually agree upon language with respect to any of the issues addressed in this Order, at the end of the sixty (60) days, the respective parties shall file proposed language representing the most recent proposal to the other Party on that issue, and the Commission shall adopt the language that best comports with the Commission's findings in this proceeding.

This Order shall remain in full force and effect until further Order of the Commission.

IT IS SO ORDERED.

BY ORDER OF THE COMMISSION:

G. O'Neal Hamilton, Chairman

ATTEST:

_____

C. Robert Moseley, Vice Chairman

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2005-57-C

IN RE:

Joint Petition for Arbitration on behalf of NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC and Xspedius [Affiliates] for an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended.	)))))))	**CERTIFICATE OF SERVICE**

This is to certify that I have caused to be served this day, one (1) copy of the **Joint Petitioners' Proposed Order** via electronic mail service and by placing a copy of same in the care and custody of the United States Postal Service (unless otherwise specified), with proper first-class postage affixed hereto and addressed as follows:

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July 27, 2006
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